
In the United States
Circuit Court of Appeals
For the Ninth Circuit. 3

ERD V. CROWELL,

Appellant,

vs.

BAKER OIL TOOLS, INC., a corporation,

Appellee.

BRIEF FOR APPELLEE.

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FILED

AUG - 9 1939

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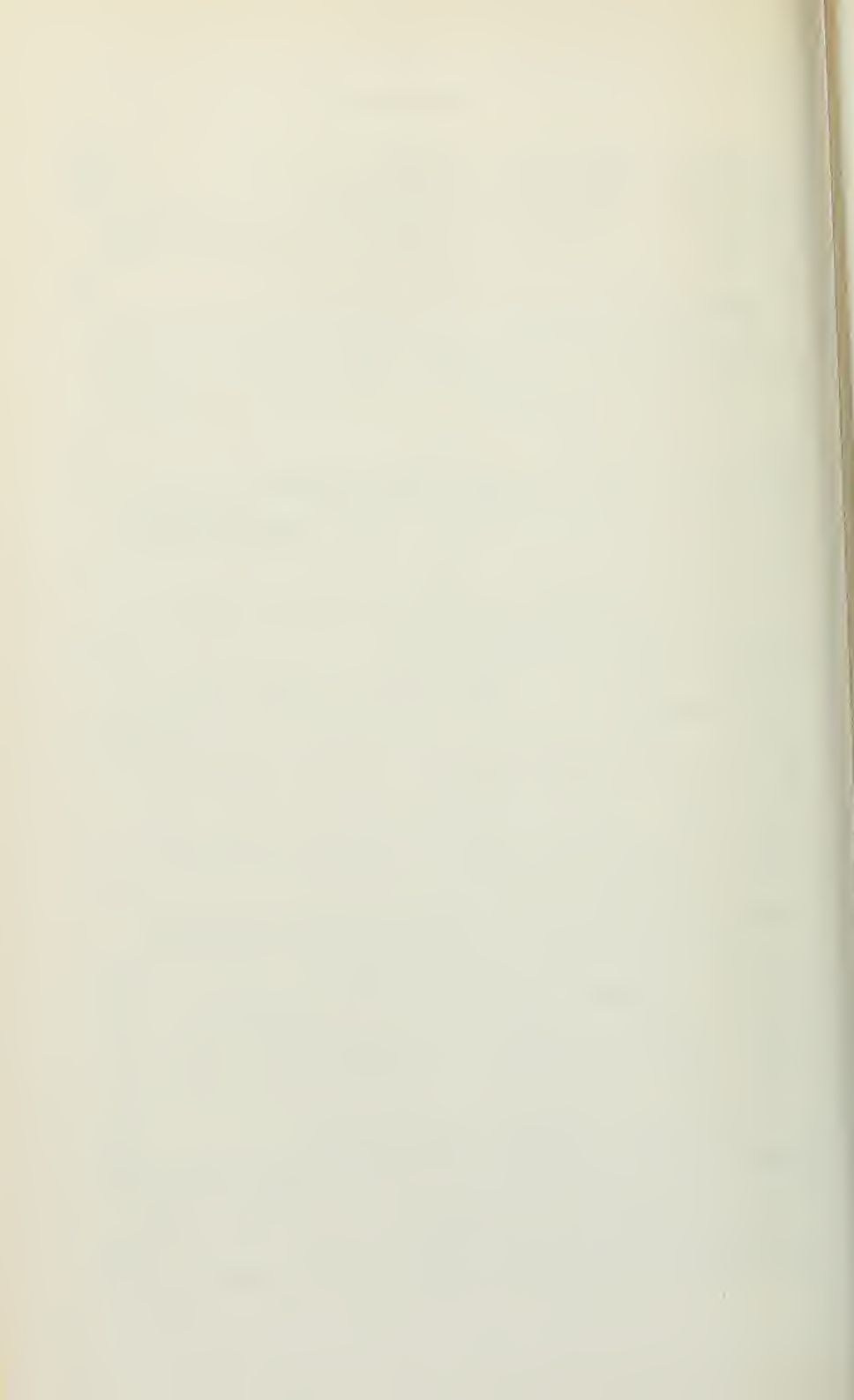
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BRIEF FOR APPELLEE.

I.

Preliminary.

Appellant's entire argument is predicated upon the contention that the trial court erred in reaching its conclusions upon conflicting evidence.

Appellant does not seek to show wherein any of the findings complained of were not supported by the weight of the evidence, but, merely taking fragmentary portions of the record, he seeks to show that there was evidence upon which the court might have reached a contrary conclusion, ignoring throughout the brief all of the facts and circumstances and admissions made by appellant himself which abundantly show that his testimony given at the time of trial, was false and completely contradicted by written admissions, and showing, also, that his present contentions are wholly without merit. He also seeks to enlarge and expand the terms of a written license by parol evidence.

Under these circumstances, as well stated by Judge Rudkin in the case of *Easton v. Brant* (C. C. A. 9th) 19 Fed. (2d) 857, 859:

“* * * the appellant is confronted by two well-established principles of law, from which there is little or no dissent: First, the findings of the chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact. *Savage v. Shields* (C. C. A.) 293 F. 863. Second, a person who seeks to vary the terms of a written contract, * * * assumes a heavy burden, and must make out his case by clear and unmistakable evidence. In such cases the court is not bound to accept the uncorroborated testimony of an interested party, even though his testimony is not contradicted.”

II.

Statement of the Case.

In view of the fact that appellant has failed to give a complete summary or statement of the case, we feel it appropriate and incumbent upon us to give such a summary, which we believe will conclusively demonstrate that appellant's appeal is wholly without merit and frivolous.

1. THE PROPOSED CONTRACTS OF MARCH AND AUGUST, 1932, AND THE LETTER OF AUGUST, 1932.

In 1927 Crowell* filed his bill against the Baker Casing Shoe Company, the predecessor of Baker, charging infringement of Letters Patent Re. No. 16516, one of the

*For convenience, we will refer to Erd V. Crowell, the appellant, as Crowell, and Baker Oil Tools, Inc., a corporation, appellee, as Baker.

patents involved in the counter-claim, the suit being numbered L-90-M, in the District Court of the United States, for the Southern District of California. [R. pp. 133-134.]

The Lorraine* Corporation, under a license agreement with Crowell, was interested in this litigation, and subsequently made a party. [R. pp. 178, 263-264.]

In 1931 Crowell discussed with Baker's representatives, the matter of settling the case of *Crowell v. Baker*. The difficulty in the way of that settlement was the interest of Lorraine in the Crowell patents and in the litigation. [R. pp. 138-139.]

In March, 1932, Mr. Mellin, attorney for Baker, prepared an agreement under the terms of which Crowell was to execute a license agreement (attached thereto as Exhibit A), as soon as he was able to establish the forfeiture of the contract under which Lorraine held his interest in the patents involved, and which Crowell contended had been breached and forfeited by Lorraine.. [R. pp. 264-265; Pltfs. Ex. 9, Book of Exhibits, pp. 83-92.] This agreement was presented to Crowell, but Crowell did not sign the same, although it incorporated the terms and conditions he stated were satisfactory to him. [R. pp. 309-310.]

While Crowell denies that he ever saw this proposed agreement, he does admit that he wrote a letter to Baker dated August 25, 1932 [R. pp. 139-140; Deft. Ex. J, Book of Exhibits, p. 175] in which he outlines the conditions upon which he would settle the litigation and grant a license to Baker. It is to be noted that he asked for a

*The Lorraine Corporation for convenience will hereafter be referred to as Lorraine.

royalty of 3½%. This royalty is the same as that incorporated in the license agreements proposed, and the one finally executed as hereinafter related. [R. p. 325.] After the receipt of this letter, Baker tendered a proposed license agreement to Crowell. [R. pp. 140, 267; Pltfs. Ex. 11, Book of Exhibits, pp. 83-92.] This agreement, as noted, gave a royalty schedule, which in effect was the same as that proposed by Crowell in his letter of August, 1932, and incorporates the various terms and conditions set forth by Crowell in that letter. Crowell retained the agreement in his possession. [R. p. 188.] While Crowell denies that he had any further negotiations with respect to the matter until 1934 [R. p. 189] Mr. Sutter, vice-president of Baker, testifies that he had further conversations with Crowell in which Crowell stated he was delaying the matter because of the status of Lorraine's title. [R. pp. 314-315.] It appears that Mr. Lorraine, the principal stockholder in the Lorraine Corporation, was having difficulty with his wife, she was seeking to obtain control of the company, and if she and others interested gained control of the company, the company was to relinquish any claim to the Crowell patents. [R. pp. 180-183, 308.]

In 1932 Crowell brought an action against Lorraine [R. p. 169] for the purpose of terminating his agreement with Lorraine, being Case No. 4906-J, in the Southern District. [R. p. 135.]

2. THE CONTRACT OF AUGUST 7, 1934, AND LETTERS
RELATING THERETO.

Mr. Crowell's story of what happened after August, 1932, is highly contradictory, and, indeed, almost unintelligible. It is admitted that on August 7, 1934, he entered into and executed an agreement bearing that date. [R. pp. 68-69; Pltfs. Ex. 1, Book of Exhibits p. 1.] This agreement recites the pendency of the *Crowell v. Baker* action, and the action brought by Crowell against Lorraine to terminate its interest in the patents, and provides that as soon as Crowell obtains title to his patents he will execute the license agreement which was attached thereto. [Book of Exhibits p. 7.] The agreement provided for the creation of a fund by Baker representing the royalties due under the license agreement, to which Crowell would become entitled when he executed the same upon becoming owner of the patents free from any assignments or licenses. It is to be noted that this agreement provides for the same scale of royalties as provided for in the letter of August 25, 1932, and the proposed license agreement drafted shortly thereafter. (Pltfs. Exhibit 11.) Shortly prior to the execution of this agreement, Mr. Crowell had the firm of Townsend & Loftus, of which Mr. Mellin was a member, prepare an amended complaint in his case against Lorraine. That action had been commenced by Mr. Bodkin (one of appellant's present counsel) [R. p. 126] representing Crowell and Mr. Westall (who had been Crowell's attorney for many years) [R. pp.

174-175] represented Lorraine in that litigation [R. p. 126], and therefore he could not represent Crowell. After the amended complaint had been prepared by Townsend & Loftus, and submitted to Mr. Bodkin, it was suggested that Mr. Mellin become associated with Mr. Bodkin in the prosecution of that action, Crowell testifying that Mr. Sutter made the original suggestion [R. p. 164], while Mr. Sutter testified that Crowell brought the matter up and asked if Baker would have any objection to having Mr. Mellin represent him as Mr. Mellin was familiar with patents. [R. p. 316.]

At this point Crowell tells two contradictory stories. One was that at the time he entered into the agreement of August 7, 1934, he was contemplating employing Mr. Mellin as his attorney in the *Lorraine* case [R. p. 132], and that in June, 1934, he contacted Mellin several times [R. p. 132] and it was understood Mellin was to take a position with Baker after the first of the year, 1935, and that he would be Crowell's attorney from there on in the case, and with that understanding, he accepted Mellin as his attorney. [R. p. 133.] On the other hand, his letter of July 27, 1935, clearly shows that Mr. Mellin was not to be employed in the *Lorraine* case until after the *Crowell v. Baker* matter had been straightened out and that the contract of August 7, 1934, was intended to clear up that controversy so Mr. Mellin could thereafter proceed with the *Lorraine* case. (Pltfs. Ex. 6, Book of Exhibits p. 73.) In that letter he also states that it was "with the antici-

pation of you (Mellin) representing me (Crowell) in the Lorraine case, that I signed the agreement to settle pending litigation”, *i. e.*, the agreement of August 7, 1934. He likewise testified that this agreement had been discussed and was “to release him (Mellin) so he could act as my (Crowell’s) attorney”. [R. p. 190.] When the difficulties of Crowell and Baker had been settled, as provided in the agreement, the interests of both Baker and Crowell in respect to Lorraine were the same as both wanted Lorraine’s interest in the patent terminated so that the license could be in full force and effect.

The letter and his testimony contradict his other story at the time of the trial, that he believed Mellin was acting as his attorney at the time he entered into the agreement of August 7, 1934.

While Mr. Crowell states at the time he signed this agreement he did not understandingly read it [R. p. 213] he, nevertheless, admitted he knew it was an agreement to settle pending litigation with a license attached [R. p. 216], and knew it was more than a mere dismissal of the *Crowell v. Baker* litigation. [R. p. 227.] He weakly testified that he put it away in a safe without looking at it. [R. p. 223.]

While he denies receiving the monthly reports [R. p. 223] required by the terms of the agreement, it conclusively appears that the statements were regularly mailed to him and the copies appear in evidence [R. pp. 72-73; Pltfs. Ex. 3, Book of Exhibits p. 45], and it is admitted

that at the time of executing the agreement of August 1, 1935, he received the full amount of royalties due under the agreement of August 7, 1934. [R. p. 74; Pltfs. Ex. 4, Book of Exhibits p. 57.]

Mr. Mellin was not actually substituted in the *Crowell v. Lorraine* case until November, 1934, after the agreement was signed [R. p. 194] and this case came on for trial in January and February, 1935. [R. p. 176.]

After the *Lorraine* case had been tried and the Master had indicated he proposed to find in Crowell's favor, Crowell wrote Baker on March 30, 1935, that he would not be bound by the agreement of August 7, 1934, and offered to release Baker from its obligations thereunder. [R. p. 224; Deft. Ex. P, Book of Exhibits, p. 189.] Prior to writing this letter he had dismissed the case of *Crowell v. Baker*. (It is to be noted that at that time he made no contention that any fraud or unfair practice existed in connection with the execution of the agreement of August 7, 1934.) Baker promptly answered the letter and insisted that Crowell perform the agreement according to its terms. [Deft. Ex. Q, Book of Exhibits p. 191.] On April 6, 1935, Crowell writes Baker [Deft. Ex. R, Book of Exhibits p. 193], suggesting a conference, to which Baker replies, on April 8, 1935 [Deft. Ex. S, Book of Exhibits p. 195] that the parties which Mr. Crowell requested to be present were not then in the city, but that they would be glad to discuss the matter with Crowell.

3. THE LICENSE AGREEMENT OF AUGUST 1, 1935, AND
LETTERS RELATING THERETO.

On July 15, 1935, Crowell writes Mellin [Deft. Ex. V, Book of Exhibits p. 201] a letter, in which he states that pursuant to Mellin's request that he put in letter form his demands, he required that the agreement of August 7, 1934, be cancelled and that he would give Baker a license to manufacture certain devices described in the Baker patents, and that he would accept the royalty schedule enumerated in the aforesaid agreement. He also mentions his desire to have the right to use and sell float valves, which are not to be on an imperforate casing, such as patented to McLaine. This, it will be noted, is the first time mention of a license from Baker to Crowell has been made. It will be noted that this description of "Float valves" aptly describes the device of his abandoned application. [Deft. Ex. G, sent up as a physical exhibit.]

On July 27, 1935, Crowell again writes Mellin [Pltfs. Ex. 6, Book of Exhibits p. 73] referring to a conversation had with him the previous morning. He directs attention to his patent No. 1,732,791 as showing "dual valves" or "opposing valves" with intermediate ports, and states that that was one reason why he claimed, as he had told Mellin, that he thought claims 1-3 and 7 of Baker patent No. 1859648 were too broad. He also refers to his abandoned application [Deft. Ex. G] as having a claim for a cementing device with "spaced valvular means" closing the bore of the casing to provide a chamber there between with ports communicating therewith, and so as to

permit material to pass out of the ports without passage of the material through the bore of the casing past the ports, and that this claim described that which Baker had patented in his patent 1,859,648, the patent of Defendant's Exhibit A [Book of Exhibits p. 129]. He makes various threats against Mellin and Baker, but states he is enclosing a copy of a license agreement, which he would be willing to sign if it meets with Westall's O. K. as to draft. This agreement appears in the Book of Exhibits commencing with page 76. This fully supports the testimony of Mr. Mellin that the reason for giving the license [Deft. Ex. A], to Crowell, was because Crowell felt he might be sued if he made the device of his abandoned application with cementitious material, as called for in the Baker patent referred to, and that it was to quiet his fears in this respect that the license was given [R. pp. 92-93], and entirely discredits Crowell's present contention that he exhibited to Mr. Mellin a drawing of a single valve device such as illustrated by Defendant's Exhibit E [Book of Exhibits p. 143] and that he had merely exhibited the drawings of the abandoned application to show what he did not intend to make. [R. p. 147.] He also states in his letter that he had been given the rush act by Mellin and Sutter to get the agreement of August 7, 1934, signed, and that the implications of that agreement had been misrepresented to him. This is the first time he made any reference to any such alleged fraud. This alleged fraud is denied by Mellin and Sutter [R. pp. 269-271, 320-322] is not supported by Crowell's testimony [R. pp. 212-225] and is apparently abandoned on this appeal.

The agreement which is attached to the letter is substantially the same as that executed on August 5, 1935. [Pltfs. Ex. 2, Books of Exhibits p. 13.] It differs from

the one which Crowell had agreed to execute by his agreement of August 7, 1934 [Pltfs. Ex. 1] in that instead of being an exclusive license, it is a non-exclusive license and includes Baker Whirler Shoes and Side Hole Shoes, upon which no royalties were to be paid under the agreement of August 7, 1934. The schedule of royalty payments was identical with that provided for in the agreement of August 7, 1934, which was at the same rate as proposed by Crowell in his letter of August 25, 1932, and in the proposed agreement delivered to him in August, 1932. This proposed license contained the same provisions as that which he executed a few days later, with the exception that the Whirler Shoes and Side Hole Shoes were eliminated from the royalty provisions of the latter. The same royalty schedule is retained and Baker assented to Crowell's request that the agreement be non-exclusive instead of exclusive, as provided in the agreement of August 7, 1934.

In his letter Crowell evidences a willingness to execute the agreement if "it meets with Westall's O. K. as to draft"—Mr. Westall, as noted, having been his attorney for many years. This completely refutes appellant's present contention that Mr. Mellin, and not Mr. Westall, was acting as his attorney during those negotiations.

On July 28, 1935, Crowell writes another letter to Mr. Mellin [Def't. Ex. W, Book of Exhibits p. 205] stating that he had written a rather hot letter the previous day [Pltfs Ex. 6]; that he appreciates Mellin "is the man at the bat" for the Baker Company; that he looks forward to doing further business with Mellin; that they had been through one lawsuit together [the *Lorraine* case; R. p. 204], Mellin had delivered the goods and had been paid

and therefore they were even. He further states that what Mellin should do instead of making a spectacular trade for Baker, is to try to bring the parties together on an equitable deal; that he appreciates his patents might be punctured but the Baker patents would fall in the same heap, and that Baker will not get a license from him unless he restricts the same to his own structure. Mellin immediately writes Crowell [Deft. Ex. X, Book of Exhibits p. 207] reminding Crowell that he had had an agreement practically identical with the one he executed (the agreement of August 7, 1934) for substantially a year prior to the time he signed the same (as noted, this was the agreement submitted to Crowell in August of 1932) [Pltf. Ex. 11, Book of Exhibits p. 97] and that his implications of fraud and misrepresentations were wholly without basis.

He further states he resents the Crowell statement implying that a confidential relationship existed between them as between attorney and client, when he, Crowell, knew there was no such relationship; that no veiled threats or imputations could deter him from doing what he believes his duty as an attorney to be; that he had conferred with Mr. Baker and that they had reached a definite conclusion; that he would be in Los Angeles on Thursday and would be pleased to discuss the matter with him at that time.

The parties met at Mr. Mellin's room in the Hotel Hayward and the agreement of August 1, 1935 [Pltfs. Ex. 2] licensing Baker to practice the inventions, the subject matter of the counter-claim, was executed, as was the license from Baker to Crowell [Deft. Ex. A].

4. THE NOTICE OF INFRINGEMENT AND LETTERS
RELATING THERETO.

After executing the license of August 1, 1935, and receiving the limited free license of like date [Deft. Ex. A], Crowell commenced the manufacture of the device of Defendant's Exhibit E and Mellin, on behalf of Baker, notified Crowell of infringement of Baker patents No. 1,491,915, No. 1,748,007 and No. 1,859,593, the patents in suit in the principal action herein. [Plfts. Ex. 14, Book of Exhibits p. 111.] Crowell replies on March 17, 1936 [Plfts. Ex. 15, Book of Exhibits p. 113] acknowledging receipt of the notice of infringement, and discusses the various Baker patents relied on and attempts to distinguish the same. He further states: "although I am licensed by the Baker Oil Tools, Inc. to operate Patent No. 1,859,648, I am not doing so—for reasons of my own", and further claims that this patent, as well as the patent No. 1,859,593, of which Mellin claimed infringement, was anticipated by his abandoned application No. 5,477. [Deft. Ex. G.] He also states that his device does not infringe any of the patents referred to in Mellin's notice of infringement, or any other patents.

Following this letter, in which he not only states that he was not making the device under the license, but that the device was one which did not come within the claims of any of the patents, he sends a notice of rescission of the license agreement he had granted to Baker in which he reverses his position in respect to the effect of the license. [Deft. Ex. B, Book of Exhibits p. 131.] The notice of

rescission was dated May 18, 1936, and purports to rescind the license from Crowell to Baker [Pltfs. Ex. 2] on the ground that the agreement had been obtained by fraud in that it had been definitely represented that the device charged to infringe was agreed should be included within the scope of the license from Baker to him [Deft. Ex. A] and that the institution of the present infringement action was a denial of the representations made and an effective rescission of that agreement, and that the consideration for the license agreement to Baker from him had failed as the execution of the license from Baker to him was a part of the consideration for his license to Baker.

Mr. Westall, Crowell's attorney, was immediately notified that the notice of rescission was based upon false premises and that Baker would insist upon an enforcement of its rights under the agreement. [Deft. Ex. E, Book of Exhibits p. 141.]

We have throughout this summary of the facts endeavored to present the facts in the view most favorable to Crowell, and as may be noted, have relied practically exclusively upon Mr. Crowell's evidence, his agreements and his written admissions contained in correspondence written long prior to the time when his apparent present urge to be relieved of his legal obligations arose. His present testimony contradicting or seeking to overcome these facts will be discussed in the argument following.

SUMMARY OF ARGUMENT.

I. Appellant's infringing structure was not the subject of the license from Baker to him nor was that license the consideration for the license from appellant to Baker.

- (a) The consideration for appellant's license to Baker was fixed by appellant himself long prior to mention of Baker's license to appellant.
- (b) Appellant was legally bound to execute the license to Baker without reference to Baker's license to him.
- (c) Appellant wanted only the right to make the device of his abandoned application with a cementitious plug, the infringing structure not being discussed, and the license he received secured that right to him.
- (d) Appellant admits he did not manufacture the infringing structure under the license.

II. Mellin's testimony is not inconsistent.

- (a) It is certain that the infringing structure was not discussed at the time the license was executed.
- (b) It is certain that the license from Baker to appellant was to be limited to the structure of the device of the abandoned application with a cementitious plug and it was so limited.
- (c) His testimony is fully supported by appellant's written declarations.

III. Appellant was not licensed to make the infringing device. [Deft. Ex. E.]

- (a) The language of the license does not describe the infringing device, it is applicable to the device of appellant's abandoned application.

- (b) No representations that he could make the infringing device under the license were made.

IV. The consideration for the execution of the license agreements has not failed.

- (a) Appellant's rights are measured by the terms of the agreements.
- (b) No license under other Baker patents can be implied because
 - (1) The license itself provides against such construction;
 - (2) Appellant can make a device under the license which will not infringe other Baker patents;
 - (3) A license under other patents of licensor is implied only when the licensee cannot make any device under the license without infringing other patents.
- (c) Baker has denied appellant no right to which he was entitled under his license.
- (d) Baker has fully performed its obligations under the agreements.

V. The infringing device is not within the scope of the license under Baker patent No. 1,859,648.

- (a) The patent shows and claims dual valves spaced apart and capable of independent operation—the infringing device does not have any such structure.
- (b) Appellant himself admits that the single valve of the infringing device cannot and does not perform the functions of the two valves of the Baker patent and that the two devices do not operate in the same manner.

- (c) The single valve of the infringing device is not the mechanical equivalent of the two valve structure of the patent.
- (d) Appellant admits he did not make the infringing device under the license.

VI. Appellant did not execute the Baker license because of fraud or undue influence.

- (a) Westall, not Mellin, was appellant's attorney.
- (b) Mellin was only employed for a single case and that employment had terminated.
- (c) Crowell relied on his attorney Westall, not Mellin, in the matter.
- (d) Crowell placed no confidence in Mellin.
- (e) Under any view of the case appellant was not misled.

VII. The court did not err in admitting plaintiff's Exhibit 1 in evidence.

- (a) Fraud being charged all circumstances surrounding the execution of the licenses could be inquired into.

VIII. Conclusion.

- (a) One attacking the findings of the chancellor must show that they are not supported by the evidence or are against the weight of the evidence and appellant has not sustained this burden.
- (b) Irrespective of the foregoing rule the court below could not have reached any conclusion other than the one it did.

ARGUMENT.

I.

Crowell's Infringing Device [Defendant's Exhibit E] Was Not Discussed Nor Referred to at the Time the License From Baker to Crowell Was Granted, Nor Did That License Form the Basis of the Consideration for the Execution of the License From Crowell to Baker Dated August 1, 1935. [Pltfs. Ex. 2.]

As has been seen, in August, 1934, under the terms and provisions of Plaintiff's Exhibit I, Crowell became obligated, as soon as the Lorraine litigation was terminated in his favor, to execute a license to Baker. The consideration for this license was the royalties therein provided for, the amount of which had been agreed upon at as early as August, 1932. The statements of royalties due thereunder were regularly mailed to Crowell, and at the time of the execution of the agreement in August, 1935, all past royalties were paid and all royalties subsequent to that date have been paid or tendered to Crowell. [R. p. 74.]

As Crowell was obligated to execute the agreement of August 1, 1935, by virtue of the terms of the agreement of August 7, 1934, he was not entitled to any further or additional consideration for its execution. To require that a person do that which he is legally bound to do can never, under any circumstances, be deemed a fraud. (*Thomson v. Mortgage Investment Co.*, 99 Cal. App. 205, 213; *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 577.)

As is fully evidenced from the foregoing statement of facts, Crowell had been temporizing for a long period of time concerning the settlement of his litigation with Baker, at all times agreeing to grant Baker a license under his

patents, but forever seeking to avoid carrying his promises into effect, and even after he had definitely agreed in writing to do so, even then attempting to avoid his obligations in that respect. As the record clearly shows, Baker finally became disgusted with his temporizing and insisted that he perform his agreement. [R. p. 291.]

Crowell then stated that he was fearful that if he manufactured the device of his abandoned application with a cementitious plug, that Baker would sue him under patent No. 1,859,648, and to quiet his fears in this respect, the limited license under that patent was granted to him. [R. pp. 92-93, 102-103, 108.] That the matter under discussion at the time the license from Baker to Crowell was given was a dual valve device with the valves spaced apart, fully appears from Plaintiff's Exhibit No. 6, a letter written by Mr. Crowell the day after his conversation with Mr. Mellin relative to this license, in which his dual valve patent and application was discussed by him as showing why he believed the device of his abandoned application anticipated the Baker patent under which he was granted the license, and shows clearly that the claims asserted by him in respect to the patent under which he was subsequently licensed, related solely to dual valve devices, and not a device with a single valve, as now contended for. That he never thought that his present device was intended to be within the terms of the license agreement, is further emphasized in his letter of March 17, 1936 [Plfts. Ex. No. 15] in which he states that he is not exercising rights under the license from Baker under Patent No. 1,859,648. Certainly if he felt, as he now contends, that that license covered the device of Defendant's Exhibit E, he would have so stated at the time he was charged with infringement.

Noteworthy, too, is the fact that the license agreement itself provides that the “devices which said Erd V. Crowell may manufacture and sell must employ poppet type spring pressed *valves** and shall not employ ball valves or their equivalent, as shown in the patent”. Patent No. 1,859,648 [Def’t. Ex. C, Book of Exhibits p. 135 *et seq.*] shows and claims the use of spaced valves with a cementitious plug. It does not show a single valve device, and as we will see, a single valve device cannot perform the functions ascribed to the two valves of the patent.

It is therefore clear that the matter under discussion at the time Defendant’s Exhibit A was executed was the question of whether or not Baker would sue Crowell if he made a two valve device as described in the patent, and that none of the parties had in mind at that time a single valve device such as Defendant’s Exhibit E. The communications furthermore show that Crowell was very familiar with all of the Baker patents and if he wanted a license to make a single valve device it is certainly surprising that he had not asked for a license under the Baker patents relating to single valve devices, and it is significant that he did not change his contention that his present device was not within the terms of the license until he gave the notice of rescission.

We have already seen that Crowell was obligated to execute the license agreement to Baker without any further or additional consideration, and his testimony at the trial that the license agreement from Baker to him was a very important consideration for the execution of the

*Italics throughout this brief, except where otherwise noted, may be deemed ours.

agreement for the license from him to Baker is wholly without merit.

His testimony [R. p. 159] that the royalties to be paid under his license to Baker was not substantial consideration therefor, but that the real consideration was the execution of Defendant's Exhibit A, is likewise wholly refuted by the evidence. As early as 1932 when he delivered the letter to Baker stating he would take a 3½% royalty, which is substantially the royalty actually reserved in the subsequent license agreements [R. p. 325] shows clearly that he at all times thought these royalties were ample and sufficient consideration for his agreement to license Baker to use the patents, the subject matter of the counterclaim. At no time did he ever suggest any higher rate of royalty, and this fact of itself amply supports Mr. Mellin's testimony that the free license granted by Baker to him was solely for the purpose of quieting his fears as to a possible infringement action if he used a cementitious plug claimed in the Baker patent, in the manufacture of the device of his abandoned application.

It is inconceivable that Baker would grant Crowell a free license to practice the various valuable patents owned by it in return for the execution by Crowell of an agreement he was already legally obligated to sign and deliver. The agreement is explicit that it was limited to the use of poppet *valves* and was not to give any right to Crowell under other Baker patents; but Crowell now insists that the license must be varied and extended by his uncorroborated parol testimony that he exhibited a drawing of his infringing device to Mellin. Not only does Mr. Mellin deny this, but the circumstances and admissions of Crowell completely refute his present assertion.

We therefore respectfully submit that Assignments of Error II, VIII, X, XI, XIII, XIV, XV, XVI and XLI are wholly without merit and the findings complained of by said Assignments are fully supported by the evidence. These findings are:

“IV.

That on the 1st day of August, 1935, plaintiff, Baker Oil Tools, Inc., and defendant, Erd V. Crowell, entered into a written agreement (Plaintiff's Exhibit 2) granting certain licenses and rights to plaintiff with respect to and under defendant's Letters Patent Nos. 1,432,017 and Re. 16516.

V.

That the monetary consideration expressed in said agreement is fully and entirely adequate.

IX.

That it is not true that Oscar A. Mellin, acting for plaintiff Baker Oil Tools, Inc., in negotiating said written agreements was familiar with or knew anything about certain inventions owned by defendant Erd V. Crowell upon which letters patent of the United States were pending.

X.

That it is not true that plaintiff's attorney, Oscar A. Mellin, at that time was familiar with or knew anything about preparations then being conducted by defendant, Erd V. Crowell, for the manufacture and sale of the alleged new invention of the said Erd V. Crowell, which has since become known as 'The New and Improved Crowell Cementing Shoe with Plug Operated Float Valve for Guiding, Floating and Cementing' and 'The Crowell Swirler Collar' illustrated and described in the folder, Defendant's Exhibit E.”

II.

There Is No Inconsistency in the Testimony of Mr. Mellin.

Mr. Mellin testified very definitely that he knew nothing of the device illustrated in Defendant's Exhibit E at the time of the negotiations relative to the license agreements herein involved.

As appears from the record [R. pp. 105-109] Mr. Mellin testified that Mr. Crowell had told him he was going into the business of manufacturing cementing equipment; that at one time previous to the negotiations, Crowell sought to explain various devices of his, but Mellin would not permit him to as he did not want to see any of his new improvements as his client Baker was also developing new cementing devices and both might be working along similar lines; that at the time of the disputed conversation, Crowell insisted that what he wanted to make was a two valve device similar to the device of his abandoned application, with a cementitious plug in place of the cast iron discs therein shown, and that he was fearful that so constructed, Baker might claim infringement of patent No. 1,859,648; that he did listen to his description of the device he wished to make under the license, but that it was at a different time and as to other devices, concerning which he advised him he did not care to have explained.

Counsel's assertion that from the foregoing it is clear that Crowell did not represent that he wanted to make the device of his abandoned application, is wholly without

merit. The very purpose of discussing the abandoned application was to illustrate what he desired to make and not to show what he did not desire to make.

The sketch which Mr. Mellin drew from memory on the blackboard, Plaintiff's Exhibit 7, figure A, is, we submit, substantially the same as that of the abandoned application, with the exception that the passageway between the two poppet valves is constricted, whereas, in the abandoned application, it is not so constricted, and certainly this slight difference, especially when Exhibit 7 was drawn entirely from memory, forms no basis for counsel's assertion that it creates any contradiction in Mr. Mellin's testimony, or was far from accurate as disclosing what Crowell described to him.

On page 40 of the brief, counsel seek to make it appear, by reason of an interruption, which he himself made, that Mr. Mellin was not definite that Mr. Crowell wished to make a device with two valves spaced apart. We merely refer the court to the record [R. pp. 114, 115] which clearly demonstrates that Mr. Mellin was definite as to the type of construction Crowell described to him. Mellin had ample authority for separating the valves, as shown in the sketch, Figure A, Plaintiff's Exhibit 7, because the device of the abandoned application [Deft. Ex. G] shows valves which were so separated, and, as we have noted, the

patent under which the license was granted likewise has dual valves which are separate and spaced apart.

Counsel's assertion (App. Br. p. 39) that there is no evidence that Crowell ever showed to Mellin any such drawing as Plaintiff's Exhibit 7, and that Mellin does not testify that he did, is wholly unsupported by the record. [R. pp. 110-111.] The drawing of the abandoned application did not show "exactly" what Crowell desired to make, as he proposed to substitute a cementitious plug for the metal discs therein shown, but there can be no doubt that with this substitution that was "exactly" what Crowell told Mellin he desired to make.

There is no inconsistency in Mr. Mellin's testimony, and inconsistency cannot be supported by reference to the structure shown in Exhibit E or Defendant's Exhibit AA, because if anything is clear from the record, it is that the device of the two latter exhibits was never explained to, nor shown, Mr. Mellin, and Mr. Crowell's unsupported assertion, contradicted by his own written admissions, cannot, we submit, even rise to the dignity of a conflict in evidence, let alone warrant or support a finding by the Court that he did show any such drawing to Mellin or advise him that he planned to make any such device.

We submit that Assignments of Error I, IV, VI and VII are not well taken.

III.

Appellant Was Not Licensed to Make the Infringing Device [Defts. Ex. E].

Counsel refer to Crowell's statement (Brief p. 43) that Crowell showed Mellin the file wrapper of his abandoned application [Deft. Ex. G] to show him what he did not intend to make. The contention is ridiculous on its face. His letter, written immediately after the conference during which he expressed his desire for a license from Baker [Pltfs. Ex. 6] shows clearly that he had taken the position that the Baker Patent No. 1,859,648 was too broad, as it incorporated the device of the abandoned application, and this fully supports Mr. Mellin's testimony that they discussed the question of a license under that patent so that Crowell would be free from any claim of infringement by Baker in the event he made the device of his abandoned application with a cementitious plug, as shown in the Baker patent.

The abandoned application likewise showed poppet *valves* and, as Crowell assured Mellin that he wanted nothing more than the right to use a cementitious plug with such poppet valves, the license was so restricted. It is surprising that Crowell would go to the trouble of discussing his abandoned application in a letter following the conference, if, at the time of the conference he merely showed it to Mellin to show what he did not want to make, rather than to illustrate that which he actually desired to do. If he did not intend to make the device of the abandoned application, why did he discuss the matter at all; and if he did not want to make a dual valve device, but only a single valve device, why didn't he secure a license under the Baker patents covering that construction (and, as we have

noted, he was thoroughly familiar with the Baker patents) instead of agreeing to a license which aptly described the device of the abandoned application, and which stipulated that it should not be deemed a license under any other Baker patents?

As clearly appears from Mellin's testimony [R. pp. 81-82] the licenses were not executed as cross-licenses. Crowell was already obligated to execute the one to Baker, and the one to him was simply to quiet his fears as to an infringement action if he made the dual valve device of his abandoned application, and to obviate the necessity of bringing a suit for specific performance of his agreement of August 7, 1934. We quite agree that that was the purpose of giving the license, but we do not agree, as asserted by counsel, that it was for the purpose of avoiding a suit for infringement if he made a device other than the one explained to Mellin, and which actually infringed (as does Defendant's Exhibit E) patents belonging to Baker other than those under which he was licensed.

Mellin did not admit at R. p. 114, or at any other place, as unfairly inferred by counsel, that the single valve device was ever discussed, nor is there any inconsistency in any of Mellin's testimony in respect to the device described by Crowell. Of course Mellin states [R. p. 101] that the device of the abandoned application with its dual poppet valves made with a cementitious plug, would not infringe any of the other Baker patents. We think this is obvious from a comparison of the device of the abandoned application and that of Baker Patent No. 1,859,648, but he at no time admitted, and clearly he could not, that the single valve device of Defendant's Exhibit E would not infringe other Baker patents.

As we will later show, Defendant's Exhibit E does not come within the scope of the claims of Baker Patent No. 1,859,648.

We therefore respectfully submit that Assignments of Error XIX and XXI are without merit and the following findings complained of are fully supported by the evidence:

“XI.

That it is not true that plaintiff's attorney, Oscar A. Mellin, during the negotiations which led to the execution of the written agreements of August 1st, 1935 (Plaintiff's Exhibit 2 and Defendant's Exhibit A) represented to defendant Erd V. Crowell in any manner whatsoever, that plaintiff Baker Oil Tools, Inc., could not and would not raise any objection whatsoever to the manufacture, use and sale by defendant Erd V. Crowell of the subject matter illustrated and described in Defendant's Exhibit E.

XII.

That it is not true that defendant, Erd V. Crowell, was led through representations of plaintiff, or of plaintiff's attorney Oscar A. Mellin, to believe that defendant Erd V. Crowell was fully licensed under the said agreements of August 1st, 1935, to make, and/or use, and/or sell, all or any of the subject matter illustrated and described in Defendant's Exhibit E, nor that defendant, Erd V. Crowell, would not be harassed by any charge of infringement on any patents owned or controlled by plaintiff, Baker Oil Tools, Inc., because of the manufacture, use or sale by the defendant, Erd V. Crowell, of the subject matter described and illustrated in defendant's Exhibit E.”

IV.

The Consideration for the Execution of the License Agreements Has Not Failed.

We may concede that the license Crowell gave to Baker [Pltfs. Ex. 2] was a valuable license. This is shown by the fact that Baker agreed to and did pay Crowell valuable and ample royalties for the right to use the patents of that license. As we have seen, that consideration was fixed by Crowell long prior to any discussion of a license from Baker to him under Patent No. 1,859,648, and this consideration was ample to support the grant and conceded to be ample by Crowell himself during all of the years of negotiation. While Baker had spent considerable money in preparing for the defense of the infringement action, it is clear it desired to be free from that suit and settle it by taking a license. Baker did not concede the question of infringement, but as a matter of good business it believed it was better to settle than to have protracted litigation. As the consideration for the license from Crowell to Baker had been agreed upon long prior to Crowell's desire for a license from Baker to him, it is self-evident that such consideration was ample without the alleged consideration of the additional license. The latter license was given solely to quiet Crowell's fears, was a free license and granted to Crowell exactly what he had bargained for, to-wit: the right to make the device of his abandoned application with a cementitious plug, as shown in Baker Patent No. 1,859,648.

The law is well settled in respect to license agreements, as well as in respect to other written agreements, that the terms of the agreement measure the rights of the parties. (*Ruckstell Sales & Mfg. Co. v. Perfecto Gear Differential*

Co. (D. C. N. D. Cal. S. D.) 28 Fed. (2d) 407.) There, as here, a limited license had been granted and the licensee sought to enlarge the scope of the license so that he could prevent others from manufacturing devices within the scope of the rights retained by the licensor, but the Court appropriately held that the license agreement measured the rights of the licensee.

A limited license conveys only the rights defined therein, and if the licensee makes any other or different use than that authorized by the license, he becomes an infringer and his limited license is no justification for his acts. (*Cinema Patents Co. Inc. v. Columbia Pictures Corp.* (C. C. A. 9) 62 Fed. (2d) 310.) The mere fact that the limited license does not authorize the manufacture or use of a device which the licensee believes necessary to his business, does not authorize any deviation from the terms of the license, nor does the fact that without such enlargement of the scope of the license, it would become valueless because of trade conditions, justify any extension or enlargement of the rights granted. (*Vulcan Mfg. Co. v. Maytag Co.* (C. C. A. 8) 73 Fed. (2d) 136.)

Thus, in the instant case, as the license is limited, the defendant Crowell can claim no rights other than those specifically set forth therein, irrespective of the degree of utility of the device he was authorized to make. Nowhere does he contend that such a device would not be an operative and useful device. The very fact that he took the license under the dual valve patent is an admission that such dual valve construction with the valves spaced apart,

was a practical and operative device. Indeed, the similar construction shown in his abandoned application (but without the cementitious plug) likewise shows that he believed, and must concede, that such construction is practical and operative. The license particularly calls for the use of poppet *valves* in the place of ball *valves* as shown in the patent. As the patent clearly shows two spaced and independently acting *valves* of the ball type, there can be no question as to the meaning of the license. The poppet type *valves* were to be substituted for the ball *valves*, as shown in the patent.

The only time when a licensee can be deemed to be licensed under patents held by the licensor other than those set forth in the license, is in the event that the licensee cannot make any device under his license without infringing other patents held by the licensor. (*United Nichel Co. v. California Elec. Works* (C. C. Cal. 25 Fed. 475; *Edison Elec. Light Co. v. Peninsular Light, Power & Heat Co.* (C. C. A. 6th) 101 Fed. 831; 48 C. J. 269.)

Thus, as it is conceded that Crowell can make the device of the abandoned application with cementitious material under the license granted, his contention that so construed he has been granted nothing, must necessarily fail.

In our opinion, it is wholly immaterial whether or not the use of cement plugs in devices of this character were known prior to the granting of the Baker patent, assuming that such use is shown by Defendant's Exhibit Z, which we deny. It might show a reason why Crowell was not

required to pay a royalty to Baker under the license, but certainly cannot afford any reason for extending the scope of the license to encompass a device which is clearly beyond its terms.

Before closing this discussion, we wish to refute the implication of counsel's argument on pages 52 and 53 of appellant's brief that Mr. Mellin was advising Mr. Crowell as to his rights, was acting as his attorney in the matter and that he refused to have the agreement checked by Crowell's attorney Westall.

Mellin had acted for Crowell in the Lorraine litigation, in which Crowell's interests and those of Baker were substantially identical, because as soon as the case was successfully terminated in Crowell's favor, Crowell was to give Baker the license here in suit, but before either of the license agreements were executed in August, 1935, Mellin wrote Crowell stating he was not acting as his attorney and that there had never been any confidential relationship between him and Crowell in respect to the matter and advising him he had conferred with Mr. Baker and they had reached a very definite conclusion in respect to the matter. How, then, can Crowell state that he relied upon Mr. Mellin to advise him in respect to his controversy with Baker, for whom Crowell at all times knew Mellin acted? His assertion that he believed Mellin was acting as his attorney in the matter, when he at all times knew and recognized that Mellin was Baker's attorney, falls of its own weight. As the record will show [R. p. 291] Mellin did not refuse to let Westall check any of the proposed agreements. He suggested that Westall come over to the hotel room where they were having their conference, and check them. He did refuse, however, to

permit any further temporizing on the part of Crowell. Crowell failed to accept his suggestion that Westall inspect the agreements at the hotel room. The answer to the matter is that Crowell knew Baker would not coddle him any more, and he signed the agreement granting Baker a license in substantial accordance with his original contract with which he was thoroughly familiar, and accepted the limited license [Deft. Ex. A] with full knowledge of its terms and restrictions, and with full appreciation of the fact that it was limited, as appears on its face, to the spaced dual valves of the poppet type, in place of the ball valves, as shown in the patent, and Mellin correctly advised him this was the type of structure that the license authorized him to make.

We therefore respectfully submit that Assignments of Error XXIV, XXV, XXXIV, XXXV and XXXIX are not well taken. The following findings complained of are fully supported by the evidence:

“XIV.

That on May 18, 1936, defendant, Erd V. Crowell, through his counsel, Joseph F. Westall, served on plaintiff, Baker Oil Tools, Inc., a purported NOTICE OF RESCISSION OF LICENSE AGREEMENT OF AUGUST, 1935, (Defendant's Exhibit B), but said Notice of Rescission was not well founded and was wholly ineffectual and did not constitute a rescission of said license agreement of August 1st, 1935 (Plaintiff's Exhibit 2).

XXII.

That the consideration for said agreement of August 1, 1935, (Plaintiff's Exhibit 2) has not failed, nor has any part of said consideration failed.”

V.

The Infringing Device [Defts. Ex. E] Is Not Within the Scope of Baker's License to Crowell [Defts. Ex. A] or Patent No. 1,859,648.

Counsel insist that the device of Defendant's Exhibit E is within the scope of the claims of Patent No. 1,859,648, and therefore within the scope of Defendant's Exhibit A, and they cite various general rules with respect to the construction to be given claims of a patent. In doing so, they wholly omit to state one well recognized rule and wholly ignore the effect of another, conceded by them to exist. The rule which is not stated by them, is that in construing the claims of a patent, the claims must be read in the light of the specifications and drawings of the patent. (*Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537; *Holland Furniture Co. v. Perkins Glue Co.*, 277 U. S. 245, 257; 72 L. Ed. 868-873; *Grand Rapids Showcase Co. v. Weber Showcase & Fixture Co.* (C. C. A. 9) 38 Fed. (2d) 730, 731.)

The rule stated by counsel, but not observed in their analysis, is that infringement by mechanical equivalents is only made out when the parts are used in substantially the same way, or where the second device retains the principle of the first and its mode of operation and attains its result by the use of the same or equivalent means. Where, as here, the patents are not basic but operate in a field in which a number of patents already exist [R. pp. 94-95] the patent will not be construed so as to enlarge its scope and permit the patentee, and therefore, the licensee, to appropriate other inventions such as here attempted by the licensee. (*Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609; 27 S. Ct. 307; 51 L.

Ed. 645; *Webber Elec. Co. v. E. H. Freeman Elec. Co.*, 256 U. S. 668; 41 Sup. Ct. 600; 65 L. Ed. 1162; *Chicago & N. W. Ry. Co. v. Sales*, 97 U. S. 563; 24 L. Ed. 1053.)

Counsel in their discussion, seek to compare the device of the abandoned application with Claim 5 of Baker Patent No. 1,859,648, eliminating from the claim in making the comparison, certain very significant language, and also in part, changing the language of the claim. For example: the language of the claim (as to the matters set opposite the numeral 15) requires that "said valve body being formed with communicating upper and lower valve chambers" instead of, as given by counsel "said valve body being formed with (a) communicating upper * * * valve chamber." Opposite the numeral 16 the language "said valve body being formed" does not appear in the claim at all. [Deft. Ex. C, Book of Exhibits 135, Pat. p. 3, lines 70-91.]

Thus the claim specifically requires communicating upper and lower valve chambers with valve means in each to accomplish the purposes set forth in the claim. As we will see these purposes cannot be fulfilled with the single valve of Exhibit E. As there are to be two chambers with communication between the same, and as valve means are to be in each, it is clear that the valves are to be spaced apart. The valves so spaced apart are shown in the drawings of the patent, and also in the drawing of the abandoned application. Counsel insist that the two chambers of the claim and the valve means for each, are the mere mechanical equivalents of a single chamber, with a single valve with two opposing faces. But if we assume that a single chamber suffices, that is, that the sides of the communicating means may be extended so as to become co-extensive with the walls of the two chambers still this

does not obviate the requirement of the claim that the valve means be spaced apart.

Mr. Mellin did not at any time admit or testify that the valves were not to be separate and independently operable, nor can counsel's interruption of his testimony lead to such conclusion. He testified again and again that the device Crowell explained to him was one with two valves, as shown in the abandoned application "where he had two spaced valves with a chamber between them and side ports outside the barrels between these valves." [R. pp. 107, 108, 111, 113-114, 116, 123-124, 128-130.]

Mr. Crowell does not in his testimony show that each element mentioned in the claims of Baker Patent No. 1,859,648, is found in Defendant's Exhibit E, performing the same function and leading to the same result. His testimony on cross-examination is directly to the contrary. [R. pp. 255-260.]

The patent provides, among other things [Deft. Ex. C, Pat. p. 2, lines 101-105] "after the cement has been completely discharged, the back pressure of the cement will maintain valves 21 and 26 seated, and prevent the cement from returning into the casing". Crowell was forced to admit the obvious, that when his device is closed and the valve is on the lower seat, it would have to remain seated to perform the function of valve 26 of the patent, and that therefore it would permit (without valves upon the exterior of the side ports) the cement to enter the interior of the casing and move upwardly therein, and that it therefore could not perform the function of valve 21 of the Baker patent; that under the Baker patent the valves can act independently so that both can be seated at the same time, while with his device, only one portion of the

valve can seat at any one time. [Crowell R. pp. 259-260.] Thus under Crowell's own admissions his device does not operate in the same manner, nor does his single valve with its two faces, perform the same functions as the dual valves of the Baker device. This must be obvious even from a comparison of the patent with the device of Exhibit E.

In the patent, the upper valve 21 performs two functions: first, when the device is being lowered into the well, and there are no other floating attachments below it on the casing string, it acts as a float valve, closing the casing above the device, thus preventing mud or other fluid from entering the casing as it is lowered in the well. After the device is set at the place it is desired to cement the well, cement is pumped downwardly through the casing, and thus forces the valve 21 off of its seat. When the device comes to rest and the drilling mud no longer forces the lower valve 26 off of its seat, the valve 26 is seated. The cement then is forced out through the openings 29 in the side of the device and finds its way around the casing and into the formation so as to effect the cement seal. The cement, of course, is in liquid form, and after it has been forced beyond the casing to create the seal, it is necessary to hold it in place until it sets. In the device of the patent this is accomplished in the following manner: when cement is no longer being forced through the upper passageway 14, the float valve 21 will return to its seat and prevent the cement from coming back into the casing string above the device. The lower valve 26 having a specific gravity greater than the cement, remains seated, and thus prevents the cement from going into the lower bore of the hole. The cement thus is held in place until after it is set. [R. pp. 117-120.] The advantage of

having a cementitious plug as stated in the patent (p. 2, lines 45-50) is so that the mechanisms may be readily drilled out without the possibility of fracturing the cement seal.

As we have noted, Crowell acknowledges that his single valve will not operate to hold the cement in place after the cementing operation is finished, as do the valves in the Baker device. Indeed, it is obvious from a mere inspection of Exhibit E that the upper valve face cannot be seated at the same time the lower valve face is seated. The patent requires that the valves operate independently of each other for otherwise the device cannot operate in the manner outlined. The device of the abandoned application would operate similarly to the device of the Baker patent, the springs of the poppet valves causing the same to seat after the cement has been pumped through the side ports into position.

Crowell was delightfully indefinite as to where his valve of Exhibit E should be or was intended to be at the different stages of cementing; or how it was intended to function upon the completion of the cementing operation. [R. pp. 256-259.] From an inspection of the device it appears that the spring will normally keep the valve seated in its upper position, closing the casing when the device is being lowered into the well, and also that when cement is forced downwardly through the device, it will overcome the resistance of the spring and the pressure in the lower hole area and cause the lower face of the valve to seat, thus closing off the lower bore of the well. Upon the completion of the cementing operation, were it not for the saxophone valves at the exterior perimeter of the casing, and if they were discarded (there are none on the Baker

device) the cement would be free to either enter the casing above the device, or enter the lower bore of the hole, dependent, according to Crowell, upon the strength of the spring. [R. pp. 256, 259.]

As Mr. Crowell admitted, under the Baker patent, the valves can (and the specifications require that they do) function independently so that both can be seated at the same time, while in the Crowell device, the upper and lower valve faces cannot function independently, and only one portion of the valve can be seated at any one time.

While Crowell endeavored to testify that these differences in function were not of practical utility in the cementing art, that of itself is wholly immaterial in determining the question of mechanical equivalents. However, it must be obvious that if the cement is not held in place, but permitted to either enter the lower bore of the well or the upper portion of the casing before it set, channelling would be caused and the cement seal greatly impaired.

We do not say that the Crowell device will not hold the cement in place until after it is set. What we do say is that the cement cannot be held in place through the medium of the single valve, which is claimed to be the mechanical equivalent of the upper and lower valves of the Baker patent. In the Crowell device, the saxophone valves at the exterior perimeter of the casing, perform this function, as they are adapted to close as soon as the cement is no longer forced through them. [Deft. Ex. E; R. pp. 129, 258.]

Crowell, intent, of course, upon trying to show that his single valve was a mechanical equivalent of the dual valves of the Baker device, could not rely upon the saxophone

valves as the means by which the cement was held in place [R. p. 257], but as he had to admit, if the saxophone valves were not there, the cement upon completion of the job, could either rush into the lower bore or flow upwardly into the casing, which, of course, would spoil the cement job.

It is therefore clear that the two devices do not perform the same functions in the same manner, nor can the upper and lower valve faces of the Crowell device operate in the same manner as the separate valves of Baker; nor can it perform the functions for which the Baker valves were intended. Counsel appreciating this obvious fact, argue at great length that the consolidation or separation of the valve chambers housing the operative means, was immaterial, and that the abandoned application showed two poppet valves operating, as it were, in a single chamber, and that therefore the dual chamber requirement of the Baker patent was immaterial. We may grant this to be true, but still this minor distinction does not avail counsel anything in view of the fact that the operation of the Crowell device and the Baker device is essentially different, and this is not a case where the consolidation of two elements to operate upon the same principle and in substantially the same manner, is involved.

We therefore respectfully submit that the Crowell device [Def't. Ex. E], as he himself frankly admitted in his letter [Pltfs. Ex. 15] did not involve the use or operation of the Baker patent or his license thereunder.

It is respectfully submitted that Assignments of Error XII and XLVI are without merit.

VI.

**Appellant Did Not Execute the Baker License Because
of Any Fraud or Undue Influence.**

Appellant throughout his brief, continually asserts that he relied upon Mellin to advise as to the scope and effect of the license agreements; that Mellin acted for him as his representative or lawyer throughout the negotiations, and that because of this confidential relationship, he was misled or deceived.

That this theory of the case was built up entirely out of whole cloth when he sought to defend himself when he was sued for his piracy of the Baker patents and sought to wrongfully make a device not encompassed by his license is fully apparent from his letters, and we believe we cannot too harshly condemn his clearly false testimony at the time of trial, by which he seeks to take from an attorney his most cherished and valued possession, his reputation for honesty and integrity. Mellin's employment by Crowell, and the only employment for which Crowell claims he paid him was in connection with the prosecution of the Lorraine litigation in which the interest of Baker (Mellin's client) was similar to that of Crowell. As a courtesy to Crowell, Mellin wrote a letter [Deft. Ex. T, Book of Exhibits p. 197] to the Halliburton Oil Well Cementing Company, giving notice of infringement of the patents, involved in his license to Baker, and one additional patent, and that is all that was done by Mellin in that connection. As Crowell admits, Mr. Westall, one of his present counsel, was his regular patent counsel. Westall represented him in his action against Baker, which was settled by the giving of the license agreement to Baker. It was to the same attorney that he looked for advice

when he entered into the final agreement of August, 1935. [Pltfs. Ex. 6, Book of Exhibits p. 75.]

Turning to Defendant's Exhibit W [Book of Exhibits p. 205] we find that Crowell did not believe Mellin was his "general counsel" but that he had employed him only in the *Lorraine* case ("one law suit"), but also that that law-suit and employment had been terminated ("you delivered the goods and have been well and promptly paid, therefore *we are even*, I look forward to the possibility of us doing *further business*").

It was necessary for Crowell to employ counsel other than Westall in the *Lorraine* case because Westall, his regular counsel, represented Lorraine. If Crowell had had any possible belief that Mellin was acting for him, or that Mellin believed he was acting for him, it certainly should have been put to rest by Mellin's letter of July 31, 1935 [Deft. Ex. X, Book of Exhibits p. 207] in which Mellin definitely advises him he was not acting in any such capacity. Why, Mr. Crowell even admits [Deft. Ex. W] that Mellin was "the man at the bat for the Baker Company", thus showing clearly he could not have considered him as being the "man at the bat" for him. Not only do his letters contradict his present story, but his testimony given in a deposition in a state court action likewise shows that he did not rely on Mellin for advice, but, on the contrary, had lost all confidence in him prior to the execution of the agreements. [R. pp. 245-247.]

In light of these written statements of his client and his prior testimony under oath, we are somewhat surprised

at the temerity of counsel in advancing the contention that Crowell thought Mellin was representing him rather than Baker, and that he relied on Mellin's advice. Indeed, when Crowell was taken to task concerning his testimony, he became delightfully vague and contradictory. [Cf. R. pp. 203, 204, 205, 207, 209, 210, 211, 245-247.]

It is clear Crowell knew Mellin was representing Baker, and Crowell dealt with him in that capacity; that Crowell relied upon Mr. Westall in connection with these negotiations as he now relies upon him to put forward his present fantastic story and contentions. Under these circumstances there was no confidential relationship, even though the attorney had represented him in a different matter (*Grauber v. Light*, 127 Cal. App. 576) and Mellin having definitely put him on notice that he was not acting in the capacity Crowell belatedly asserted to exist, it was not incumbent upon Mr. Mellin to urge him to seek independent advice. (*Boardman v. Crittenden*, 52 Cal. App. 438.) Indeed, as noted, he was relying on Westall for advice in the matter. Not only did he say he wanted "Westall's O. K. as to draft", but on the very day he signed the agreements he was in Westall's office and executed a patent application on the device of Exhibit E. [R. p. 157.] This shows conclusively that Westall was his attorney, not Mellin, and he was not relying on Mellin in any way in connection with the controversy. Indeed, if the device of Exhibit E was under discussion, why didn't he bring his application for it with him as well as his abandoned application. The answer is that he

never discussed any device with Mellin except the one of his abandoned application.

We cannot definitely understand from appellant's brief whether it is his contention that Mellin was his agent in the transaction, in which case Baker would not be liable for the fraud of Crowell's agent, or if it is his contention that Mellin, being the agent for Baker and having defrauded Crowell, Baker must be held liable, nor will we undertake to solve this dilemma for counsel, because as we read the record, and as Crowell has recognized time and time again in his written communications, he did not regard Mellin as his attorney. He did not, and could not, consider him as a trusted advisor or agent. As we have abundantly shown, there were no misrepresentations of any kind made in respect to the scope of the license agreement Baker gave Crowell. There was no failure of consideration for the agreement Crowell gave Baker. At the time he received his license from Baker, he was legally obligated, under the agreement of August 7, 1934, to grant Baker the license involved.

It is respectfully submitted that Assignments of Error IX and XXII are without merit and that finding VI is fully supported by the evidence. It is as follows:

“That plaintiff, Baker Oil Tools, Inc., its employees, agents or attorneys, did not misrepresent, nor did not, nor did any of them, induce said defendant Erd V. Crowell to enter into said agreement of August 1st, 1935, either through misrepresentations, fraud or undue influence.”

VII.

The Court Did Not Err in Admitting Plaintiff's Exhibit I in Evidence.

While Plaintiff's Exhibit 1 as an operative agreement was superseded by the execution of Plaintiff's Exhibit 2, the license from Crowell to Baker, still the evidence given in respect to execution of Plaintiff's Exhibit 1 and the performance by Baker of the terms and conditions thereof, showed clearly the legal obligation resting on Crowell to execute Plaintiff's Exhibit 2, and showed clearly the sufficiency of the consideration for that agreement, as it had been fixed in Plaintiff's Exhibit 1 long prior to the desire of Crowell to obtain a license from Baker for the making of the device of his abandoned application with a cementitious plug. Counsel cite no authority in support of their contention that the evidence was erroneously admitted, and in view of the charges of fraud made, the rule that all of the circumstances surrounding the transaction may be inquired into is applicable and is so well established as to need no citation of authority. This of itself demonstrates the fallacy of the Assignment of Errors in respect thereto.

Conclusion.

The situation presented by this appeal is merely that of a party who seeks, by a purely fabricated story, inconsistent with all of his written declarations and agreements, to gain advantages and rights greater than those conferred upon him by the agreements, irrespective of any of the dictates of honesty and fair dealing.

We have not reviewed in detail the various cases cited by counsel for the reason that we have no quarrel with the doctrines expressed therein. The full and complete answer to each of them is that the facts of this case do not justify the application in the manner sought by appellant, of the various rules cited.

Before closing, we wish to apologize to the Court for the length of this brief. It has been rendered necessary because of the fact that appellant did not give us any clear statement of what he thought the evidence shows, or any connected or coherent statement of the facts. We have, therefore, had to make a somewhat detailed statement of the evidence in the hope that it might be of assistance to the Court.

We have also been put to the necessity of analyzing and refuting, by the record, the many unjustifiable inferences and conclusions sought to be established as alleged facts by the appellant. We respectfully submit that the entire record shows valid subsisting agreements between the parties openly arrived at through honest and fair negotiations between parties fully competent to deal with

the subject matter involved and well versed in the legal force and effect of the agreements made, and thoroughly conversant with all of the patents involved in the transaction.

We therefore respectfully submit not only that appellant has failed to point out or establish wherein any of the Findings of Fact are not supported by the evidence (*Adamson v. Gilliland*, 242 U. S. 350, 353, 61 L. Ed. 356; *National Reserve Ins. Co. of Ill. v. Scudder* (C. C. A. 9) 71 Fed. (2d) 884; *McCullogh v. Penn Mut. Life Ins. Co.* (C. C. A. 9) 62 Fed. (2d) 831; *Turner & Dahnken v. Crowley* (C. C. A. 9) 252 Fed. 749) or are even against the weight of the evidence (*Hyland v. Millers Nat. Ins. Co.* (C. C. A. 9) 91 Fed. (2d) 735) but also that in view of all of the evidence the court below could not have reached any conclusion other than the one it did, and that therefore its decree should be affirmed.

Respectfully submitted,

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